4/21/92 325.1379

STATE OF CALIFORNIA

BOARD OF EQUALIZATION

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition for Redetermination under the Sales and Use Tax Law of: [redacted] Petitioner	DECISION AND RECOMMENDATION [redacted]

The above-referenced matter came on regularly for conference before Senior Staff Counsel Stephen A. Ryan on December 17, 1991, in Downey, California.

Appearing for Petitioner: [redacted]

Appearing for the Sales and Use Tax Department:

Mr. Raymond Harispe
District Principal Auditor

Ms. Jackie Lowry
Senior Tax Auditor

Protested Item

The protested tax liability for the period July 1, 1987 through June 30, 1989 is measured by:

Item	State, Local and County
B. Gross receipts from taxable California retail sales - disallowed foreign commerce deductions	$451,753

Petitioner's Contention

No tax is due because of the foreign commerce exemptions.

Summary

Petitioner is and was engaged in business of "wholesale, export and retail sales of household appliances", according to the auditor's description. It has been in business since 1970. The most recent Board audit covered the period from January 1, 1977 to March 31, 1980.

As a result of a test regarding audit item B, the auditor disallowed exemptions from tax which petitioner had claimed on its sales and use tax returns on the basis of sales in interstate and foreign commerce. The auditor concluded that the requirements of Regulation 1620 had not been met by petitioner to prove that exports had been commenced by petitioner by the time petitioner sold the goods. Petitioner had sold household appliances such as refrigerators, washers, dryers, televisions, and VCRs, all of which were of a 220-volt, 50-cycle, electrical type which could not functionally be used in the United States. To function via the electricity available in the U.S., these types of appliances would have needed to be on a 60-cycle basis rather than 50-cycle. Mr. Harispe stated that under current technology, these appliances would not function properly in the U.S. even if they were converted to a 60-cycle type.

These appliances in the transactions in question were all physically delivered by petitioner to the purchasers in California in original packages. The purchasers were foreign citizens who were vacationing here, or temporarily residing here for business, school or foreign government purposes. The appliances were all ultimately transported in the original packages to foreign countries for functional use. The time periods during which the appliances were first stored here in the original

boxes were fairly short. Petitioner believes that each purchaser collected multiple appliances which were shipped together at a time when the purchaser travelled to his/her homeland or when a family member could pick them up from the shipper in the homeland.

According to petitioner, these appliances were shipped by common carrier. Petitioner was not involved in ordering or paying for the shipments. The purchasers, or their employers, families, etc., handled and paid for the shipping.

Ms. Lowry stated that the stream of foreign commerce had not commenced when petitioner delivered each appliance to a purchaser in California. She cited Mr. Harispe's letter to petitioner that the appliances were not subject to an irrevocable commitment for export when delivered to the purchasers.

Petitioner believes that this situation falls into a gray area of the law. Since it knows that the appliances were sold to be shipped to another country for the first functional use, its representatives contend that the exemption applies. It was also argued that the exemption can apply even if Regulation 1620(a) does not cover this specific situation wherein everyone knows that the goods were sold for functional use only outside California since functional use in California was impossible. Petitioner's representatives mentioned that the Board has held in other similar situations that taxpayers are exempt, including in some cases wherein it was less guaranteed that the goods would actually be exported. A Board Tax Tip Bulletin was identified, as were various Board annotations and examples in Board regulations.

No exemption card information was obtained by petitioner from any foreign consular officers, employees or their family members who may have made purchases.

In other nondisputed transactions, the auditor allowed as exempt the gross receipts from California retail sales wherein petitioner delivered the product directly to a forwarding agent or carrier for shipment to another country.

Analysis and Conclusions

Absent an exemption, sales tax is imposed upon retailers measured by the gross receipts derived from

California retail sales of tangible personal property (Revenue and Taxation Code sections 6003 and 6051). "Sale" is defined, in pertinent part, to include any transfer of title, or possession in lieu of title, of tangible personal property for consideration (Rev. & Tax. Code § 6006(a)). The place of sale is the place where the property is physically located at the time the act constituting the sale takes place (Rev. & Tax. Code § 6010.5). It is presumed that all gross receipts are subject to sales tax until the contrary is established (Rev. & Tax. Code § 6091). The taxpayer has the burden to prove that an exemption is applicable (Standard Oil Co. v. State Board of Equalization (1974) 39 Cal.App.3d 765, 769, 114 Cal.Rptr. 571). No exemption can be allowed based solely upon the oral testimony from a taxpayer that he is exempt (see People v. Schwartz (1947) 31 Cal.2d 59, 66, 187 P.2d 12; and Paine v. State Board of Equalization (1982) 137 Cal.App.3d 438, 443, 187 Cal.Rptr. 47.)

If the sale occurs in California, then absent an exemption or prohibition, the Board can impose sales tax on the seller's gross receipts even if the parties intend that the goods will later be shipped outside California (Department of Treasury v. Wood Preserving Corp. (1941) 313 U.S. 62, 68, 61 S.Ct. 885, 85 L.Ed. 1188; Shell Oil Co. v. State Board of Equalization (1966) 64 Cal.2d 713, 724, 51 Cal.Rptr. 524; and Southern Pacific Equip. Co. v. State Board of Equalization (1971) 16 Cal.App.3d 302, 308, 94 Cal.Rptr. 107).

Section 6352 of the Revenue and Taxation Code provides that a sales tax exemption applies to gross receipts when the State of California is prohibited from taxing under the U.S. or California Constitutions.

Article I, section 10, clause 2 of the federal Constitution, the import-export clause, provides: "No State shall, without the consent of the Congress, lay any imposts or duties on...exports...."

As shown by the California Supreme Court in Shell Oil Co., supra, 64 Cal.2d at 717, the import-export clause and section 6352 can be considered together.

Revenue and Taxation Code Section 6387 reads as follows:

> "There are exempted from the computation of the amount of the sales tax the gross receipts from sales of tangible personal

property purchased for use solely outside this State and delivered to a forwarding agent, export packer, or other person engaged in the business of preparing goods for export or arranging for their exportation, and actually delivered to a port outside the continental limits of the United States prior to making any use thereof."

The California Legislature has also enacted Revenue and Taxation Code section 6396 to accommodate the U.S. Constitutional restrictions on California taxation of sales. This statute provides that gross receipts are exempt from sales tax if derived from a sale of property which, pursuant to a contract of sale, is required to be shipped and is actually shipped to a point outside California by either facilities of the retailer, or by the retailer's delivery to a carrier, customs broker, or forwarding agent.

The Board has promulgated Regulation 1620 to implement the laws regarding exports. Relevant provisions include:

"(a)(1) When a sale occurs in this state, the sales tax, if otherwise applicable, is not rendered inapplicable solely because the sale...precedes a movement of the property from within this state to a point outside its borders. Such movements prevent application of the tax only when conditions exist under which the taxing of the sale, or the gross receipts derived therefrom, is prohibited by the United States Constitution or there exists a statutory exemption....The retailer has the burden of proving facts establishing his right to exemption.

* * *

"(3)(C) Exports.

"1. When Sales Tax Applies. ...sales tax applies when the property is delivered in this state to the purchaser or the purchaser's representative prior to an irrevocable commitment of the property into the process of exportation. It is

immaterial that the disclosed or undisclosed intention of the purchaser is to ship or deliver the property to a foreign country or that the property is actually transported to a foreign country.

* * *

"2. When Sales Tax Does Not Apply. Sales tax does not apply when the property is sold to a purchaser for shipment abroad and is shipped or delivered by the retailer to the foreign country. To be exempt as an export the property must be intended for a destination in a foreign country, it must be irrevocably committed to the exportation process at the time of sale, and must actually be delivered to the foreign country prior to any use of the property. Movement of the property into the process of exportation does not begin until the property has been shipped, or entered with a common carrier for transportation to another country, or has been started upon a continuous route or journey which constitutes the final and certain movement of the property to its foreign destination.

"There has been an irrevocable commitment of the property to the exportation process when the property is sold to a purchaser for shipment abroad and is shipped or delivered by the retailer in a continuous route or journey to the foreign country by means of:

"(a) Facilities operated by the retailer,

"(b) A carrier, forwarding agent, export packer, customs broker or other persons engaged in the business of preparing property for export, or arranging for its export, or

"(c) A ship, airplane, or other conveyance furnished by the purchaser for the purpose of carrying the property in a continuous journey to the foreign country, title to and control of the property passing to the purchaser upon delivery. Delivery by the retailer of property into a facility furnished by the purchaser constitutes an irrevocable commitment of tne property into the exportation process only in those instances where the means of transportation and character of the property shipped provide certainty that the property is headed for its foreign destination and will not be diverted for domestic use. The following are examples of deliveries by the retailer into facilities furnished by the purchaser which demonstrate an irrevocable commitment of the property into the exportation process:

"1. Sales of fuel oil delivered into the hold of a vessel provided by the purchaser. The fuel is to be unloaded at the foreign destination.

"2. Sale of jewelry delivered aboard a scheduled airline with a scheduled departure to a foreign destination.

"3. Sale of equipment, designed specifically for use in the foreign destination, delivered to a foreign purchaser's aircraft. The foreign purchaser has filed a flight plan showing that the aircraft will be transporting the property on a continuous journey to its foreign destination.

"The following are examples of sales which do not demonstrate sufficient indicia of an irrevocable commitment to the exportation process and do not qualify as exports:

"1. Sale of jewelry delivered to a foreign purchaser at the retailer's place of business or to the purchaser or his representative at the airport prior to boarding the plane. The tax applies even though the purchaser may hold tickets for the foreign destination.

"2. Sale of a television set delivered into the trunk of a passenger vehicle or into the storage area of a pickup truck.

"3. Sale of equipment delivered to a foreign purchaser's aircraft even though a flight plan had been filed showing that the aircraft was to be flown to a foreign destination. If the equipment sold had been altered or specifically designed for use in the foreign destination, then the combined factors of the character of the property and the means of transportation would provide certainty of export and the sale would qualify as an export as described in (3) above.

Export has not begun where property is transported from a point within this state to a warehouse or other collecting point in this state even though it is intended that the property then be transported, and in fact is transported, to another country. Nevertheless, sales of property are exempt if transported under the circumstances described in 2.(b) above to a warehouse or other collecting point of a carrier, forwarding agent, export packer, customs broker, or other person engaged in the business of preparing property for export, or arranging for its export."

The Board's Tax Tip Pamphlet No. 32 on the subject of sellers making sales for resale or export to purchasers from Mexico, sales and use taxes, which was mentioned by claimant, reads as follows in relevant part:

"SALES FOR EXPORT

"CONDITIONS FOR EXEMPTION

"A sale to a Mexican purchaser that is not for resale may qualify for exemption as an export to a foreign country.

"Sales tax does not apply when the property is sold to a purchaser for shipment abroad and is shipped or delivered by the retailer to the foreign country. To be exempt as an export the property must be intended for a destination in a foreign country, it must be irrevocably committed to the exportation process at the time of sale, and must actually be delivered to the foreign country prior to any use of the property. Movement of the property into the process of exportation does not begin until the property has been shipped, or entered with a common carrier for transportation to another country, or has been started upon a continuous route or journey which constitutes the final and certain movement of the property to its foreign destination.

"There has been an irrevocable commitment of the property to the exportation process when the property is sold to a purchaser for shipment abroad and is shipped or delivered by the retailer in a continuous route or journey to the foreign country by means of:

"Facilities operated by the retailer.

"A carrier, forwarding agent, export packer, customs broker or other person engaged in the business of preparing property for export, or arranging for its export, or

"A ship, airplane, or other conveyance furnished by the purchaser for the purpose of carrying the property in a continuous journey to the foreign country, title to and control of the property passing to the purchaser upon delivery. Delivery by the retailer of property into a facility furnished by the purchaser constitutes an irrevocable commitment of the property into

> the exportation process only in those instances where the means of transportation and character of the property shipped provide certainty that the property is headed for its foreign destination and will not be diverted for domestic use."

The real question in this case is whether or not the export process had begun at the time petitioner delivered the appliances to the purchasers such that the Board is prohibited from imposing sales tax on petitioner's gross receipts from these California retail sales. Another way of looking at this issue is whether or not petitioner's sale and delivery of the appliances in California to the purchasers together with the purchasers' storage of the appliances in this state until later delivery to a carrier for shipment abroad allows the Board to impose sales tax on petitioner's gross receipts without pronibition.

"Exportation is a severence of goods from the mass of things belonging to this country with an intention of uniting them to the mass of things belonging to some foreign country or other. (Swan & Finch Co. v. United States (1903) 190 U.S. 143, 145 [47 L.Ed. 984, 23 S.Ct. 702].)" (Rice Growers' Association of California v. County of Yolo (1971) 17 Cal.App.3d 227, 234, 94 Cal.Rptr. 847; Matson Nav. Co. v. State Board of Equalization (1955) 136 Cal.App.2d 577, 583, 289 P.2d 73).

There is no immunity from state taxation as an export until the property has "been shipped or entered with a common carrier for transportation to another State or [has] been started upon such transportation in a continuous route or journey" (Coe v. Errol (1886) 116 U.S. 517, 527, 29 L.Ed. 715, 6 S.Ct. 475; and Shell Oil Co., supra, 64 Cal.2d at 718). There must be both certainty that the goods will go abroad, and either motion or commitment to a motion in the export process, concurrently, to find that goods are exports (Rice Growers' Association, supra, 17 Cal.3d at 233; Shell Oil Co. v. State Board of Equalization, supra, 64 Cal.2d at 718, 720-721; Hugo Neu Corp. v. County of Los Angeles (1970) 7 Cal.App.3d 21, 24, 86 Cal.Rptr. 332; Empresa Siderurgica v. County of Merced (1949) 337 U.S. 154, 156-157, 93 L.Ed. 1276, 69 S.Ct. 995; Richfield Oil Corp. v. State Board of Equalization (1946) 329 U.S. 69, 82-83, 91 L.Ed. 80, 67 S.Ct. 156).

Goods are not "exports" just because they eventually left the United States (Rice Growers' Association, supra, 12 Cal.App.3d at 239). The mere

intention, without motion, to export is not sufficient in itself to create an export exemption from tax (Diamond Match Co. v. Ontonagon (1903) 188 U.S. 82, 95-96, 47 L.Ed. 394, 23 S.Ct. 266; Empressa Siderurgica v. Merced Co., supra, 337 U.S. at 156; Rice Growers', supra, 17 Cal.App.3d at 237). Certainty, by itself, that the goods will be transported overseas does not create the status of "export", or in other words, all goods designated for export are not automatically exempt from state taxation (Sugarman v. State Board of Equalization (1958) 51 Cal.2d 361, 367; Hugo Neu, supra, 7 Cal.App.3d at 24). The fact that the goods could not be diverted to other uses or purchases is a factor increasing the certainty of export, but does not by itself make the goods "exports" until the final journey out of the U.S. begins (Empresa Siderugica, supra, 337 U.S. 154; Rice Growers', supra, 12 Cal.App.3d at 238).

The export motion process has not begun until the goods have made a movement on their continuous ultimate or final passage of export commencing with the regular steps of exportation such as facilities of the retailer, a person engaged in the export business, such as a forwarding agent, packer, broker, or carrier, or a conveyance furnished by the purchaser for the purpose of so carrying the property (Reg. 1620(a)(3)(C)(2); Coe v. Errol, supra, 116 U.S. at 527; McCluskey v. Marysville & North'n Ry Co. (1971) 243 U.S. 36, 40, 61 L.Ed. 578, 37 S.Ct. 374; Empresa Siderurgica, supra, 337 U.S. at 157; A.G. Spalding & Bros. v. Edwards (1923) 262 U.S. 66, 69-70, 67 L.Ed. 865, 43 S.Ct. 485; Shell Oil Co. v. State Board of Equalization, supra, 64 Cal.2d at 720-721. The export process can begin at the time the seller delivers goods to an export packer as the final act of that seller's sale of those goods to a purchaser who has purchased the goods for export to another country with further steps arranged by that purchaser for a truck carrier to later take the goods from the packer to an ocean carrier for transport out of the U.S. (see Gough Industries v. State Board of Equalization (1959) 51 Cal.2d 746, 336 P.2d 161). The purchaser himself can be the person transporting the goods abroad as long as the other requirements are met, as long as the goods had commenced the export journey and the certainty of the foreign destination was plain so that there was no question that the goods would not be diverted to domestic use (Richfield Oil Corp., supra, 329 U.S. at 82-83).

While goods are stopped for an indefinite time or awaiting transportation, goods themselves are subject to ad

valorem taxation (Diamond Match Co., supra, 188 U.S. at 95-96).

The Board has published numerous legal rulings of counsel opined by its Legal Division on this subject of exports. These are found in the Board's Business Taxes Law Guide, annotations 325.0240 through 325.1760. The particular annotations which concern exports, section 6396, and shipments (in general) from California to out-of-state points, are primarily divided into two main categories: taxable cases wherein the purchaser took delivery of the goods in California prior to out-of-state journey commencing; and exempt cases wherein the out-of-state journey had commenced. Some annotations point out both categories. Several of these annotations appear to involve interstate commerce situations rather than foreign commerce, but the rationale is consistent. Several of these annotations express opinions on factual scenarios similar to petitioner's case, except for the additional fact that these appliances not being capable of functional use in California. When the seller delivers the goods to the purchaser in California and the purchaser is not then in or on a conveyance immediately scheduled to go abroad, the export process was opined not to have begun (325.0460, 325.0560, 325.1120, 325.1140, 325.1340, 325.1360, 325.1400 and 325.1420). These cases involve facts of mistaken delivery wherein the purchaser immediately takes steps to reship the goods abroad, and delivery with the purchaser immediately taking or driving the goods to another country including a case of the purchaser being at an international airport. The most important case involves a California delivery to the purchaser for storage in California for an indefinite time prior to shipment abroad (325.1400). This is almost identical to petitioner's case.

In the other nontaxable category, the goods were immediately delivered by the seller to a carrier, etc., for a continuous export journey; were sometimes stored by the seller prior to such a delivery to a carrier, etc.; or were delivered to the purchaser who was then in or on a conveyance awaiting an immediate journey abroad such as an aircraft parked at an airport gate awaiting a flight abroad (325.0280, 325.0380, 324.0460, 325.0480, 325.0640, 325.0660, 325.1020, 325.1040, 325.1080, 325.1120, 325.1150, 325.1160, and 325.1440).

It is our conclusion that petitioner is liable for sales tax on the $451,753 gross receipts in question without any exemption being applicable. It derived gross receipts from California retail sales of tangible personal

property. There is no dispute as to these latter facts. It is our finding and conclusion that the appliances were not yet exports at the time of petitioner's sales--the time when petitioner delivered the appliances to the purchasers. The export process had not then begun. No continuous journey of export had yet then commenced. Those deliveries to the purchasers were not steps in any export process, but were pre-export steps. Based upon the available evidence and inferences to be reasonably drawn therefrom, the purchasers had not even made arrangements with any carrier to transport the goods sold at the times of petitioner's deliveries to the purchasers. The purchasers were not then in or on any conveyance immediately scheduled to go abroad. The purchasers merely took the appliances home or to some other location for storage for an indefinite time period until their plans were finalized and the purchasers then took the appliances to a carrier for shipment abroad or carried them onboard an aircraft, etc., to a foreign country. The fact that there was a reasonable certainty that the appliances would not be functionally used in California due to the electrical type, by itself, is insufficient to exempt petitioner since both the certainty and the export process motion are required. There was no irrevocable commitment to the export process movement at the time of any sale.

Recommendation

Redetermine without adjustment.

Stephen A. Ryan 4-21-92

Stephen A. Ryan, Senior Staff Counsel Date

JA